

To: Board of Environmental Review

**From: Claudia L. Massman, Attorney
Specialist**

Date: October 31, 2001

**Subject: House Bill 521 and House Bill 311 Review
for Proposed Amendments to ARM 17.30.502,
17.30.602, 17.30.607 through 17.30.611,
17.30.621 through 17.30.629, 17.30.635,
17.30.641, 17.30.645, 17.30.646,
17.30.702, 17.30.715, 17.30.1001,
17.30.1006 and 17.30.1007, pertaining to
surface water quality standards**

HB 521 REVIEW

House Bill (HB) 521 (1995), codified in the Montana Water Quality Act at § 75-5-203, MCA, requires the Board of Environmental Review to make certain written findings after a public hearing and public comment prior to adopting a rule that is more stringent than a comparable federal standard or guideline.

In addition, § 75-5-309, MCA, requires the board of Environmental Review to make certain written findings that are accompanied by a board opinion evaluating the environmental and public health information in the record prior to adopting a rule that is more stringent than corresponding draft or final federal regulations, guidelines, or criteria.

The proposed action would incorporate by reference an updated version of department Circular WQB-7 ("WQB-7"), which will include: (1) revised numeric water quality standards for 64 parameters currently listed in department Circular WQB-7 (September 1999 edition); and (2) numeric water quality standards for two parameters currently not listed in WQB-7.

Specifically, the Board is proposing to revise the numeric water quality standards for 64 parameters currently listed in WQB-7, because the current standards are either more stringent or less stringent than the recommended criteria promulgated by the U.S. Environmental Protection Agency (EPA). The proposed revisions to the numeric standards for these 64 parameters will be the same as EPA's recommended criteria. The Board is also proposing numeric water quality standards for parameters that are not currently listed in WQB-7; tralkoxydim (Achieve) and Tributyltin. The numeric water quality standard proposed for Tributyltin is the same as EPA's recommended criteria. EPA has not adopted criteria for Achieve, so there is no comparable federal regulations, guidelines, or criteria for this parameter. Since there is no promulgated criteria for Achieve, DEQ developed the proposed numeric water quality standard in consultation with an EPA toxicologist using EPA's recommended process for deriving water quality criteria. Since the Board is revising and adopting numeric water quality standards that will be the same as EPA's recommended criteria in each instance where EPA has promulgated a comparable regulation or guideline, no written findings are required for the proposed revisions to WQB-7 under § 75-5-203, MCA, and § 75-5-309, MCA.

The Board is also proposing the adoption of New Rule I, which incorporates by reference updates to various EPA publications on water quality standards. Adopting by reference EPA's current regulations and guidance on water quality standards for use in implementing Montana's surface water quality standards does not require written findings under § 75-5-203, MCA, and § 75-5-309, MCA.

The remainder of the proposed revisions to the State surface water quality standards clarify existing definitions and existing requirements, clarify the location of certain stream reaches within the current stream classification system, and clarify the Department's authority to enforce the protection of designated uses. These revisions do not require written finding under § 75-5-203, MCA, and § 75-5-309, MCA.

HB 311 Review

HB 311 (1995), the Private Property Assessment Act, codified as § 2-10-101, MCA, requires that, prior to adopting a proposed rule that has taking or damaging implications for private real property, an agency must prepare a taking or damaging impact statement. "Action with taking or damaging implications" means:

[A] proposed state agency administrative rule, policy, or permit condition or denial pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana Constitution.

§ 2-10-103, MCA.

Section 2-10-104, MCA, requires the Montana Attorney General to develop guidelines, including a checklist, to assist agencies in determining whether an agency action has taking or damaging implications. I have completed an Attorney General's "Private Property Assessment Act Checklist," which is attached to this memo. Based upon completion of the checklist, the proposed rulemaking does not have taking or damaging implications and no further HB 311 assessment is required.